Supreme Court of the United States.

CLIMACO CALDERON,
Libellant-Appellant,

vs.

THE ATLAS STEAMSHIP COMPANY,
(LIMITED,)
Respondent-Appellee.

BRIEF IN SUPPORT OF THE PETITION OF CLIMACO CALDERON FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement of Facts.

The references are to the certified transcript of the record in the United States Circuit Court of Appeals for the Second Circuit herewith submitted.

In July, 1893, the libellant delivered to the respondent twenty-six bales and three crates of duck uniforms for transportation by the steamship "Ailsa" from New York to Savanilla, thence by rail to Barranquilla, there to be delivered to the Collector of Customs, for which the respondent issued its bill of lading (fol. 15 *et*

seq.). This bill contained on its face the following provision :

> " And finally, in accepting this bill of lading, " the shipper, owner and consignee of the goods " and the holder of the bill of lading agree to be " bound by all of its stipulations, exceptions and " conditions, as printed on the back hereof, " whether written or printed, as fully as if they " were all signed by such shipper, owner, consignee or holder " (fol. 20).

On the back of the bill of lading, among numerous other clauses, was printed the following :

> " 1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made " (fol. 28).

And :

> " 14. This agreement is made with reference to, and subject to, the provisions of the U. S. " Carriers' Act, approved February 13th, 1893 " (fol. 39).

The goods were not landed at Savanilla, but were brought back to New York and reshipped on the " Alvo," which was lost at sea on the voyage with all on board.

No notice of the return and reshipment of the goods was given to the libellant (fols. 9, 41). The actual value of the goods lost was $5,413.18.

The District Court held the respondents liable for the loss of the goods, but also held that the recovery must be limited to $2,900, under the condition printed on the back of the bill of lading and above quoted (fols. 196–8).

From this portion of the decree the libellant appealed. The assignments of error are at page 52.

The Circuit Court of Appeals have rendered a decision affirming the decree of the District Court (p. 55), Judge WALLACE dissenting (p. 57).

POINTS.

First. It is respectfully submitted that this is a case which it is fitting should be brought before this Court for its adjudication, *first*, because the real party in interest as appellant is the United States of Colombia, a foreign nation, friendly to the United States; *second*, because the decision of this cause will have a wide and far-reaching effect upon all those interested in the carriage of goods at sea, whether shippers or carriers, establishing or denying the right of a carrier by his own act, and in accordance with his own will, to limit his responsibility for the safe carriage of goods entrusted to him in such manner as he may see fit by a clause printed on the back of his bill of lading to which the shipper's attention is not called, and his assent is not asked, and *third*, because the decisions of both the District Court, and the Circuit Court of Appeals are seemingly in direct opposition to the decision of this Court, as will presently be shown.

Second. It is to be observed at the outset that the direct cause of the loss of the goods in question was

the negligence of the carrier in failing to land them at their port of destination. This was decided in the District Court, and the respondent did not appeal.

Third. The error committed by both the Courts below was that, having held the respondent for the loss of the goods as resulting from its negligence, they limited its liability to a sum less than the value of the goods, because of a clause in the matter printed upon the back of the bill of lading, as above quoted.

(a) As to this clause it is necessary to consider at the outset that there is neither proof, allegation nor reasonable ground for inference that it was ever brought to the knowledge of the libellant, and there is no sugestion of his assent to it, express or otherwise. The only evidence in this regard is that within three or four years the libellant had made perhaps ten shipments of goods by the respondent's line, and that on each occasion he had received a similar bill of lading (fols. 83, 84).

(b) While it is settled law that a common carrier may by express contract limit his common-law liability for goods entrusted to him, it is also settled law, as was said in Ayres vs. Western R. Corporation, 14 Blatch., 9, that no act on the part of the shipper, short of an explicit agreement, will imply an assent on his part to a contract proposed by a carrier modifying the liability of the latter. A rule which, as is said in the same case, is capable of certain and easy application, and if adhered to will go far to abrogate a class of contracts to which practically the carrier is the only party.

The case is, therefore, precisely within:

Railroad Co. vs. Manufacturing Co., 16 Wall., 318.

It is true that in the case at bar the reference in the

bill of lading to the matters printed on its back is in the following words:

> "And finally, in accepting this bill of lading the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions, as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder,"

and that in the case cited there was given a receipt for the articles shipped containing the following:

> "Subject to the rules and regulations established by the company, (of) a part of which notice is given on the back hereof."

The ground of the decision in the case last cited was that conceding the right of the carrier to discharge himself of his common-law liability by special contract, assented to by the shipper, it did not follow that he could do so by any act of his own; that acceptance of such a receipt as was given did not imply assent to its terms; that the burden of proof was on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties (or obligations) which the law has annexed to his employment.

It is not perceived that the case at bar differs in principle from the case last cited. In both the receipts given were the acts of the carrier alone. In neither case was there any "express stipulation by the shipper, either parol or in writing." Assent by a shipper to an "agreement" printed on the back of a bill of lading, though referred to on its face, is no more logically to be implied from his acceptance of the bill than is his assent to a "condition" printed on the back of a receipt and referred to on its face, to be implied from his ac-

ceptance of the receipt. The decision of both courts below is therefore in conflict with the decision of this Court in Railroad Co. vs. Manufacturing Co.

(c) The learned Judge who formulated the decision of the Circuit Court of Appeals, construing this clause as a limitation of the liability of the respondent to $100 for each package of goods unless the value was stated in the bill of lading and a special agreement made, says (fol. 222) that the validity of stipulations of this character has been repeatedly upheld by the Supreme Court, and cites

> Railroad Co. vs. Fraloff, 100 U. S., 24, 27;
> Potter vs. Majestic, 60 Fed. R., 624;

both cases of passengers' baggage, in the first of which no questions of limitation of liability by stipulation or notice was involved, but this Court said:

> "It is undoubtedly competent for carriers of "passengers, by specific regulations, *distinctly* "*brought to the knowledge of* the passenger, "which are reasonable in their character and not "inconsistent with any statute or their duties "to the public, to protect themselves against "liability as insurers for baggage exceeding a "fixed amount in value, except upon additional "compensation, proportioned to the risk;"

and in the second this Court said:

> "The common-law liability of common car- "riers for the safety of baggage of travelers is "not exactly defined, but it is not unlimited. "* * * The rule which the common law laid "down upon this subject is well understood. "The contract to carry the person only im- "plies an undertaking to transport such a "limited quantity of articles as are ordina- "rily taken by travelers for their personal use "and convenience. * * * And, there-

> " fore, as this obligation on the part of the car-
> " rier is not unlimited, but is at common law
> " not exactly defined, the carrier has a right ' by
> " ' reasonable regulations of which the passenger
> " ' has knowledge ' to define and make certain to
> " both parties the extent of an implied under-
> " taking to carry baggage, * * * and of an
> " express undertaking where the contract includes
> " baggage by name ; for an express contract which
> " simply mentions baggage would not be con-
> " strued to mean baggage unlimited in quantity
> " or value."

Neither case being authority for the proposition to which they were cited, but clearly showing the marked difference between the rules applicable to such cases and to the carriage of goods. And citing also :

Hart vs. Penn. R. R. Co., 112 U. S., 331,

which was a case of express contract in writing signed by the shipper that the property was of a stated value.

It is submitted that these cases are in no sense authority to overrule Railroad Co. vs. Manufacturing Co., *supra*, nor in conflict with that case.

(d) The Circuit Court of Appeals also erred in its interpretation of the clause in question. It reads as follows :

> " 1. It is also mutually agreed that the carrier
> " *shall not be liable* for gold, silver, bullion,
> " specie, documents, jewelry, pictures, em-
> " broideries, works of art, silks, furs, china,
> " porcelain, watches, clocks, or for goods
> " of any description which are above the value
> " of $100 per package, unless bills of lading are
> " signed therefor, with the value therein ex-
> " pressed, and a special agreement is mad ."

Exceptions or clauses introduced in favor of one party to the contract, of which he himself is the author, are to be construed most strongly against him. What is ambiguous, what is doubtful, must be construed against the shipowner in whose favor it has been inserted.

There is nothing to require a construction more favorable to the shipowner than the plain meaning of the words imports.

Leggett, Bills of Lading, p. 11.
Burton vs. English, 12 Q. B. D., 218, 224.
The Main, 152 U. S., 122-132.

Furthermore, in the interpretation of written instruments regard must be paid to the context and collocation of phrases, which in case of doubt or ambiguity is controlling. The intent of the parties must be sought in the paper itself and deduced from the expressions used. It is not permitted to speculate in this particular.

The clause under consideration was plainly intended —not to limit, but to exclude, liability on the part of the carrier in a large number of specified cases. If operative, it would be impossible to spell out from it any liability whatever on the part of the respondent for the loss of gold, silver, &c., unless the condition had been complied with.

If by this clause the respondents intended, as they plainly did, to relieve themselves under certain circumstances from any liability whatever for the loss of porcelain, watches or clocks, how can any intention on their part be inferred to remain liable to the extent of $100 per package for the very next instance of exemption specified. There is no change of phraseology.

The exemption, absolute in the one case designated by the nature of the goods, is equally absolute in the other, defined by the value of the goods enclosed in a single package.

To the average mind it would seem that the respondent had carefully chosen words to effectuate absolute exemption from all liability.

Had the phrase read, "for goods of any description, above the value of $100 per package," or, "for goods of any description, in excess of $100 per package," the intention to retain a restricted and limited liability for all other goods than those previously specified would have been plain. This form of expression is also the one most frequently used, and a departure from it is significant. When the respondent inserted the words "which are" it must be presumed to have done so advisedly, to have intended the result which the grammatical construction of the phrase so altered produced.

The sentence—

> "It is mutually agreed that the carrier shall
> "not be liable for goods of any description
> "which are above the value of $100 per pack-
> "age, unless, &c.,"

is certainly not paraphrased by the sentence,

> "It is mutually agreed that the carrier shall
> "be liable for all goods, but only to the extent
> "of $100 per package, unless, &c."

The exemption in terms is from all liability for any goods which are put up in a package, if the contents of the package are worth more than one hundred dollars. This is the plain meaning of the contract (if it is a contract) as made. To say that the parties intended only an exemption for any excess in value over $100 per package is to make a new contract for them, to which one party, at least, never assented by word or deed.

The clause in question is a creation of the respondent. In its framing the libellant had no part or voice. If it affects the libellant at all, it is because of his receipt of the bill of lading with this clause printed on

its back. It contains matter in derogation of the common-law rights of the libellant. He may therefore properly insist that it shall be literally and strictfy construed as against the respondents, and stand or fall according to its legality or illegality upon such construction.

Upon its face this clause purports to exonerate the respondent from all liabllity for the loss of goods under certain circumstances, even though, as in this case, resulting from its own fault or negligence.

It is therefore unreasonable.

Railroad Co. vs. Lockwood, 17 Wall., 357.

And unlawful.

Act of Feby. 13, 1893.

Fourth. One further consideration presents itself. The contract between the parties was for the transportation of the libellant's goods by sea from New York to Savanilla. Whatever provisions it contained referred solely to matters within the contracted voyage. Granting that the limitation of liability is as the Court below has said, that limitation referred only to occurrences during the transportation contemplated. When the vessel left Savanilla with the goods on board the contractual relation between the parties ceased. The respondent became from that moment bailee in its own wrong of the libellant's goods. It was, therefore, the absolute guarantor of their safety to the full extent of their value.

Ellis vs. Turner, 8 Term. Rept., 531.
Story on Bailments, § 509.

Fifth. The attention of the Court is earnestly requested to the dissenting opinion of Judge WALLACE (p. 57) as presenting more forcibly than we can hope to do the errors below.

Sixth. The writ of *certiorari* should issue as prayed.

J. LANGDON WARD,
Of Counsel.